(20,713.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 311.

DENNIS W. MULLAN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1908.

1 I.—*Petition.*

No. 22822.

DENNIS W. MULLAN
v.
UNITED STATES.

The original petition of the claimant was filed March 13, 1902. Subsequently, to wit, on July 7, 1902, in lieu of said original petition, and by leave of Court, the claimant filed the following:

Amended Petition.

The claimant respectfully shows to the court:

(1) That he is a citizen of the United States, a resident of the city of Annapolis, State of Maryland, and that he is a Commander on the retired list of the United States Navy.

(2) In the month of February, 1897, while claimant was Commandant at the Navy Yard at Pensacola, Florida, certain allegations of drunkenness were made against him to the Navy Department. To have an opportunity of refuting these allegations, claimant requested the Navy Department to refer them to a Court of Inquiry, and in accordance with this request, that Department ordered a Court of Inquiry to be convened at the Navy Yard, Pensacola, Florida, to investigate said allegations. This Court, consisting of a single Officer, convened at the Pensacola Navy Yard, Florida, on March 25, 1897, and upon completing its investigations submitted to the Navy Department the Record of its proceedings and findings.

(3) A copy of these findings was sent on May 15, 1897, to the claimant by the Navy Department, and in its letter transmitting the same the approval thereof by the Navy Department was also communicated to him. Upon their receipt, the claimant wrote a letter to the Navy Department on May 19, 1897, wherein, stating
2 the great consequence to him that these findings should be passed upon by the highest tribunal known to military law, he requested that a Court Martial be ordered to convene to try the same, a copy of which letter is attached to this Petition as claimant's Exhibit "A" and made a part thereof.

(4) Replying to this request, the Navy Department wrote a letter to the claimant on May 25, 1897, in which it stated, "That after "carefully considering the matter, the Department has decided, in "view of the difficulty of assembling a Court composed, as it should "be, of your seniors at so distant a station as Pensacola, and of col-"lecting all the witnesses at a more convenient point, that it will "convene a General Court Martial at the Navy Yard, Washington, "for your trial upon such portions of the findings of the Court of "Inquiry as it deems proper to charge against you (See Article

"1778, U. S. Navy Regulations, 1896), provided that the record "of such Court of Inquiry be accepted as evidence."

A copy of this letter is attached hereto as claimant's Exhibit "B" and made a part hereof.

(5) Notwithstanding claimant knew that the Secretary of the Navy of his own motion could not use before a Court Martial the record of the proceedings of said Court of Inquiry, except within certain limitations prescribed by statute, yet because of the seriousness to him—he then standing No. 2 on the active list of Commanders of the Navy, subject to an early examination for promotion to the grade of Captain—that these charges should be at once further investigated before a proper tribunal, the claimant having on June 8, 1897, been denied by the Navy Department the right to recall any of the witnesses who gave testimony before said Court of Inquiry, was compelled under this condition of *quasi duress* to accede to said decision of the Navy Department of June 8, 1897. The letters of June 2, June 8, and June 9, 1897, that passed between the Navy Department and claimant, whereby an agreement was reached, are attached hereto as claimant's Exhibits "C," "D,"
3 and "E" and made parts hereof. In making the said agreement the claimant did not consent that the record of the proceedings of said Court of Inquiry should, as evidence, be made the basis of a sentence by said Court Martial of his dismissal from the Navy. That such a sentence based upon such evidence is expressly prohibited by Article 60, Section 1624 of the Revised Statutes of the United States, and though the agreement between the Navy Department and claimant did not contain any express provision as to the character of sentence that might be rendered against him by a Court Martial, yet he did not then and does not now consider that his right to rely upon said Article 60 as a bar to a judgment of dismissal, was a right which he might or could waive, or which the Navy Department could call upon him to waive, and which in fact he did not waive. And this claimant further submits, that if he was to be tried by Court Martial at all, that when tried that it was his right, guaranteed him by Section 2, Article III, of the Constitution, to have been tried by a Naval Court to be convened at the Naval Station at Pensacola, State of Florida, where the offenses for which he was tried were alleged to have been committed, and by Article 6, Amendment to the Constitution, to be there confronted with the witnesses against him. These were rights which could not properly or legally be denied him; rights which he could not properly or legally waive, but that under a condition of *quasi duress*, he was compelled to accede to the terms of the decision of the Navy Department of May 25, 1897 (recited as Exhibit B in this Petition) and to submit to a trial before a Naval Court at the Navy Yard, Washington, D. C.; wherefore this claimant submits that all the proceedings of said Court Martial, which convened, sat, and tried him at the Navy Yard, Washington, D. C., were void *ab initio* and that said court, which sat and tried him without witnesses at the Navy Yard at Washington, D. C., for offenses alleged to have been committed by him at Pensacola, State of Florida,

and at the Navy Yard at said place, was utterly without jurisdiction to try and dismiss him from the United States Navy.

4 (6) At the Court Martial convened at the Navy Yard at Washington, D. C., on June 15, 1897, in pursuance of the above agreement, the record of the proceedings of said Court of Inquiry, in so far as the same related to the charges before said Court Martial, and testimony taken before said Court of Inquiry, were used in evidence, and in fact constituted the sole evidence upon which said Court Martial acted, except that as to one specification of the charges, where the prosecution introduced the testimony of Paymaster-General Stewart, U. S. N., which, considered as a whole, is not unfavorable to the claimant, and certainly could not have been made a basis for conviction on that charge.

(7) Upon the evidence before it the Court Martial found the claimant guilty of charges alleged, and sentenced him to be dismissed from the Navy. The sentence was approved by the Navy Department on the 30th day of June, 1897, and submitted to the President on the 30th day of June, 1897, with the recommendation that the sentence be confirmed. The President on the 8th day of July, 1897, issued the following Order:

"EXECUTIVE MANSION, *July* 8, 1897.

"The sentence in the foregoing case of Commander Dennis W. "Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To "be reduced in rank so that his name shall be placed at the foot of "the list of Commanders in the Navy, and to be suspended from "rank and duty, on one-half sea pay, for a period of five years, dur- "ing which time he shall retain his place at the foot of said list.

"WILLIAM McKINLEY."

(8) The said Court Martial by receiving and accepting in evidence the record of the proceedings of said Court of Inquiry and using the testimony adduced thereat, which (under Article 60, Section 1624 of the Revised Statutes of the United States), could not be legally used in any case extending to the dismissal of a commissioned officer, exceeded its legal authority, limited as it was by Article 60, Section 1624 of the Revised Statutes of the United States, said

5 record of said Court of Inquiry having been admitted and used as evidence before the said Court Martial, said Court thereby became prohibited from inflicting upon claimant a sentence of dismissal from the Navy of the United States, and the judgment of said Court Martial was for this reason void, and all subsequent proceedings based thereon were also void; and the Order of the President above set forth, upon which claimant's pay was reduced, as is heinafter set forth, was also void and ineffective because of the foregoing reason, and also for the further reason that said order is contrary to the provisions of Article 54, of Section 1624 of the Revised Statutes of the United States, being an Order which commuted but did not remit or mitigate the sentence of said Court Martial.

(9) In accordance with said Order of the President, the claimant was paid between July 8, 1897, and June 30, 1899, at the rate of

$1,750 per year, being one-half of the sea pay of his grade under Section 1556 of the Revised Statutes, and between July 1, 1899, and July 11, 1901, at the rate of $2,000 per year, being one-half of his sea pay under the Naval Personnel Act of March 3, 1899. On July 11, 1901, the unexpired portion of his said sentence was remitted by the President, and the claimant was restored to duty.

(10) The claimant was entitled to receive between July 8, 1897, and June 30, 1899, pay at the rate of $2,300 per year, being the amount fixed by Section 1556 of the Revised Statutes as the pay of a Commander on waiting orders, and he was entitled to receive between July 1, 1899, and July 11, 1901, pay at the rate of $3,400 per year, being the minimum pay due him under the Personnel Act, thus making now due the claimant $1,142.10 for the period between July 8, 1897, and June 30, 1899, and $2,827.80 for the period between July 1, 1899, and July 11, 1901.

(11) That claimant has not received any pay or compensation for the periods mentioned above other than that stated; that he is the sole owner of this claim and the only person interested
6 therein, and has made no assignments thereof or of any interest therein.

Wherefore claimant prays that he may have judgment against the United States for the sum of three thousand nine hundred and sixty-nine and 90-100 dollars ($3,969.90).

DENNIS W. MULLAN.

RALSTON & SIDDONS,
Attorneys for Claimants.

STATE OF MARYLAND, *County of Anne Arundel, ss:*

Dennis W. Mullan, being first duly sworn, on oath deposes and says that he is the person named in the foregoing petition, and the subscriber thereto; that he has read the same and knows the contents thereof, and that the facts therein stated upon knowledge are true, and that those stated as upon information and belief he is informed and believes to be true.

DENNIS W. MULLAN.

Witnesses:
J. ROLAND BRADY.
NICHOLAS W. BRYAN.
GEO. L. PENDLETON.

Subscribed and sworn to before me this thirtieth day of June, A. D. 1902.

J. ROLAND BRADY,
Notary Public.

EXHIBIT "A."

1420 F STREET,
WASHINGTON, D. C., *May* 19, 1897.

Hon. John D. Long, Secretary of the Navy.

SIR: Having received from you, on the 15th inst., a copy of the findings of fact submitted to you by the Court of Inquiry
7 which was ordered at my request, and which met at the Pensacola Navy Yard on March 25th last and your approval of the same; and having considered the memorandum signed by the Judge-Advocate General, I respectfully request that a Court Martial be ordered to try such charges as may be formulated from the findings of the Court of Inquiry, so that an opportunity may be afforded to try and determine such issues of fact before a Naval Court having full judicial powers.

The findings of the Court of Inquiry and your approval of them being part of the record of my naval service render it a matter of great consequence to me that whatever statement in this record may be detrimental to my record as an officer should be investigated and passed upon by the highest tribunal known to military law.

Very respectfully,

(Signed) D. W. MULLAN,
Commander, U. S. Navy.

EXHIBIT "B."

NAVY DEPARTMENT,
WASHINGTON, *May* 25, 1897.

SIR: The Department has received and considered your communication of the 19th instant, in which you request that a Court Martial be ordered to try such charges as may be formulated from the findings of the Court of Inquiry recently in session at the Navy Yard, Pensacola, Fla.

In reply you are informed that, after carefully considering the matter, the Department has decided, in view of the difficulty of assembling a Court composed, as it should be, of your seniors at so distant a station as Pensacola, and of collecting all the witnesses at a more convenient point, that it will convene a General Court Martial at the Navy Yard, Washington, for your trial upon such portions of the findings of the Court of Inquiry as it deems proper to
8 charge against you (See Article 1778, U. S. Navy Regulations 1896), provided that the record of such Court of Inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence.

You will acknowledge the receipt of this communication and state whether or not you accede to the foregoing proposition.

Very respectfully,

(Signed) JOHN D. LONG, *Secretary.*

Commander Dennis W. Mullan, U. S. Navy, care Messrs. McCammon & Hayden, 1420 F Street, N. W., Washington, D. C.

EXHIBIT "C."

1420 F STREET,
WASHINGTON, D. C., *June* 2, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th inst., relative to my request for a Court Martial, stating that the Department will convene a General Court Martial at the Navy Yard at Washington for my trial, etc., "provided that the record of such Court of Inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence." You desire me to state whether or not I accede to the foregoing proposition. In reply I beg to say that I will agree that the testimony taken before the Court of Inquiry may be accepted by the Court Martial, subject not only to the legal objections made to the questions propounded by both the judge-advocate and my counsel, but also to such other legal objections as may be made to such testimony before the Court Martial; and it is to be understood
9 that the right of "each of the parties to the trial to have the privilege of introducing other evidence" shall include the right of each of the parties to recall any of the witnesses who gave testimony before the Court of Inquiry, and also the right to take testimony by written interrogatories and cross-interrogatories. It is to be further understood that so much of the record of the Court of Inquiry as contains its findings of fact and the action of the Secretary thereon, and the memorandum of the Judge Advocate General, shall be excluded, and shall not be sent to nor considered by the Court Martial.

Believing that these suggestions of mine are within the general scope of your proposition, and are necessary to my full and fair trial, I respectfully request your acquiescence in the same, in which case I shall accede to your proposition contained in the Department's letter of the 25th inst., amended as above by me.

Very respectfully,
(Signed) D. W. MULLAN,
Commander, U. S. N.

EXHIBIT "D."

NAVY DEPARTMENT,
WASHINGTON, *June* 8, 1897.

SIR: In reply to your communication of the 2d instant, you are informed as follows:

1. Referring to your statement that you will agree that the testimony taken before the Court of Inquiry may be accepted by the Court Martial, subject not only to the legal objections made to the questions propounded by both the judge advocate and your counsel, but also to such other objections as may be made to such testimony before the Court Martial should one be ordered, I have to state that these are matters for determination of such Court.

2. Your request that each of the parties shall have the right to recall any of the witnesses who gave testimony before the Court
10 of Inquiry is denied. In the brief submitted to the Department by your counsel it is stated:

* * * It is evident from the large number of witnesses and the thoroughness of the examination that it would be scarcely possible to have more evidence adduced before a Court Martial than was presented to the Court of Inquiry. * * * (p. 2.)

* * * No Court Martial or other military or civil tribunal could have been or could be more successful in eliciting all facts bearing upon Commander Mullan's conduct. * * * (p. 42.)

3. Depositions taken, as you suggest, by written interrogatories and cross-interrogatories are not admissible as evidence before Naval General Courts Martial.

4. The findings of fact by the Court of Inquiry, the action of the Department thereon, and the memorandum of the Judge Advocate General will not be sent to the Court Martial. It may be added that the printed brief of your counsel, which has become a part of the record of the case, will be similarly withheld.

You will give this letter your immediate attention, as the Department has determined that there must be a speedy end to the matter.

Very respectfully,

(Signed) JOHN D. LONG, Secretary.

Commander Dennis W. Mullan, U. S. Navy, care Messrs. McCammon & Hayden, 1420 F street, N. W., Washington, D. C.

EXHIBIT "E."

1420 F STREET,
WASHINGTON, D. C., *June* 9, 1897.

The Honorable Secretary of the Navy.

SIR: I have the honor to acknowledge the receipt of your communication of the 8th instant, and I respectfully inform
11 the Department that I accede to the conditions therein recited, and ask that a Court Martial may be ordered, as contemplated in your letter of May 25, 1897.

Very respectfully,

D. W. MULLAN,
Commander, U. S. N.

12 II.—*Traverse.*

Filed January 10, 1907.

In the Court of Claims of the United States, December Term, A. D. 1906.

No. 22822.

DENNIS W. MULLAN
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney General.

13 III.—*Argument and Submission.*

On the 10th of January, 1907, this case came on to be heard, and was argued by Mr. William E. Richardson for the claimant, and by Mr. George M. Anderson for the defendants, and submitted.

14 IV.—*Findings of Fact, Conclusion of Law, and Opinion of the Court.*

Filed Feb'y 18, 1907.

DENNIS W. MULLAN
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is a citizen of the United States, a resident of the city of Annapolis, State of Maryland, and a commander on the retired list of the United States Navy.

II.

From July 30, 1896, until March 7, 1897, the claimant, then holding the rank of commander, United States Navy, was serving as com-

mandant of the navy yard at Pensacola, Fla. During this period certain charges of drunkenness were preferred against him to the Navy Department. The claimant upon learning of the fact requested the Navy Department to convene a court of inquiry to investigate the same. Complying with his request, the Navy Department did, on May 25, 1897, convene a court of inquiry at the Pensacola Navy-Yard, which court took the testimony of witnesses and submitted to the Navy Department the record of its proceedings and a finding adverse to the claimant.

III.

The claimant was, at the time said adverse report was submitted by this court of inquiry, subject to early examination for promotion to the grade of captain. The provisions of law relative to examining boards require that if it shall appear that the applicant is unable by reason of drunkenness or any cause arising from his own misconduct, to perform at sea the duties of the position to which it is proposed to promote him, he shall not be placed on the retired list, but discharged, with not more than one year's pay.

IV.

15 The claimant, by letter of May 19, 1897, requested the Secretary of the Navy to order a court-martial for the purpose of trying said charges. This letter is as follows:

"1420 F STREET,
WASHINGTON, D. C., *May* 19, 1897.

"SIR: Having received from you, on the 15th instant, a copy of the findings of fact submitted to you by the court of inquiry which was ordered at my request, and which met at the Pensacola Navy-Yard on March 25 last, and your approval of the same, and having considered the memorandum signed by the Judge-Advocate General, I respectfully request that a court-martial be ordered to try such charges as may be formulated from the findings of the court of inquiry, so that an opportunity may be afforded to try and determine such issues of fact before a naval court having full judicial powers.

"The findings of the court of inquiry and your approval of them being part of the record of my naval service, render it a matter of great consequence to me that whatever statement in this record may be detrimental to my record as an officer should be investigated and passed upon by the highest tribunal known to military law.

"Very respectfully, D. W. MULLAN,
"Commander, United States Navy.

"Hon. John D. Long, Secretary of the Navy."

V.

May 25, 1897, the Secretary of the Navy responded to the claimant's request as follows:

"NAVY DEPARTMENT,
WASHINGTON, *May* 25, 1897.

"SIR: The Department has received and considered your communication of the 19th instant, in which you request that a court-martial be ordered to try such charges as may be formulated from the findings of the court of inquiry recently in session at the navy-yard, Pensacola, Fla.

"In reply you are informed that, after carefully considering the matter, the Department has decided, in view of the difficulty of assembling a court composed, as it should be, of your seniors at so distant a station as Pensacola, and of collecting all the witnesses at a more convenient point, that it will convene a general court-martial at the navy-yard, Washington, for your trial upon such portions of the findings of the court of inquiry as it deems proper to charge against you (see art. 1778, U. S. Navy Regulations, 1896), provided that the record of such court of inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence.

"You will acknowledge the receipt of this communication, and state whether or not you accede to the foregoing proposition.

"Very respectfully, JOHN D. LONG, Secretary.

"Commander Dennis W. Mullan, U. S. Navy, (care Messrs. McCammon & Hayden, 1420 F street NW., Washington, D. C.)"

VI.

16 On June 2, 1897, the claimant answered as follows:

"1420 F STREET,
"WASHINGTON, D. C., *June* 2, 1897.

"SIR: I have the honor to acknowledge the receipt of your letter of the 25th instant, relative to my request for a court-martial, stating that the Department will convene a general court-martial at the navy-yard at Washington for my trial, etc., 'provided that the record of such court of inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence.' You desire me to state whether or not I accede to the foregoing proposition. In reply, I beg to say that I will agree that the testimony taken before the court of inquiry may be accepted by the court-martial, subject not only to the legal objections made to the questions propounded by both the judge-advocate and my counsel, but also to such other legal objections as may be made to such testimony before the court-martial; and it is to be understood that the right of 'each of the parties to the trial to have the privilege of introducing other evidence' shall include the right of each of the parties to recall any of the witnesses who gave testimony before the court of inquiry, and also the right to take testimony by written interrogatories and cross-interrogatories. It is to be further understood that so much of the record of the court of inquiry as contains its findings of fact and the action of the Secretary thereon, and the memo-

randum of the Judge-Advocate-General, shall be excluded, and shall not be sent to nor considered by the court-martial.

"Believing that these suggestions of mine are within the general scope of your proposition, and are necessary to my full and fair trial, I respectfully request your acquiescence in the same, in which case I shall accede to your proposition contained in the Department's letter of the 25th instant, amended as above by me.

"Very respectfully, D. W. MULLAN,
"Commander, United States Navy."

VII.

On June 8, 1897, the Secretary of the Navy replied as follows:

"NAVY DEPARTMENT,
"WASHINGTON, *June* 8, 1897.

"SIR: In reply to your communication of the 2d instant, you are informed as follows:

"1. Referring to your statement that you will agree that the testimony taken before the court of inquiry may be accepted by the court-martial, subject not only to the legal objections made to the questions propounded by both the judge-advocate and your counsel, but also to such other objections as may be made to such testimony before the court-martial, should one be ordered, I have to state that these are matters for the determination of such court.

"2. Your request that each of the parties shall have the right to recall any of the witnesses who gave testimony before the
17 court of inquiry is denied. In the brief submitted to the Department by your counsel it is stated:

"'* * * * It is evident from the large number of witnesses and the thoroughness of the examination that it would be scarcely possible to have more evidence adduced before a court-martial than was presented to the court of inquiry.'

"'* * * * No court-martial or other military or civil tribunal could have been or could be more successful in eliciting all facts bearing upon Commander Mullan's conduct. * * *'

"3. Depositions taken, as you suggest, by written interrogatories and cross-interrogatories are not admissible as evidence before naval general courts-martial.

"4. The findings of fact by the court of inquiry, the action of the Department thereon, and the memorandum of the Judge-Advocate-General will not be sent to the court-martial. It may be added that the printed brief of your counsel, which has become a part of the record of the case, will be similarly withheld.

"You will give this letter your immediate attention, as the Department has determined that there must be a speedy end to the matter.

"Very respectfully, JOHN D. LONG, *Secretary.*

"Commander Dennis W. Mullan, U. S. Navy, (care Messrs. McCammon & Hayden, 1420 F street NW., Washington, D. C.)"

VIII.

On June 9, 1897, the claimant acceded to the terms imposed by the Navy Department by the following letter:

"1420 F STREET,
WASHINGTON, D. C., *June* 9, 1897.

"SIR: I have the honor to acknowledge the receipt of your communication of the 8th instant, and I respectfully inform the Department that I accede to the conditions therein recited, and ask that a court-martial may be ordered, as contemplated in your letter of May 25, 1897.

"Very respectfully, D. W. MULLAN,
"*Commander, United States Navy.*

"The Secretary of the Navy."

IX.

In pursuance of the foregoing correspondence, a general court-martial was ordered by the Secretary of the Navy to convene at the navy-yard, Washington, D. C., to try the claimant upon certain charges and specifications.

At the convening of said court, preliminary to the introduction of evidence in the case, the Judge-Advocate presented to the court the letters between the Secretary of the Navy and the claimant, set forth in paragraphs 4 to 8, both inclusive, of the findings of fact, and the same were spread upon the record of proceedings of said court. Said court convened on June 15, 1897, and held sessions on that
18 and succeeding days, when was produced the testimony of 50 witnesses, the testimony of 49 of said witnesses having been taken before the court of inquiry above referred to, which testimony was admitted in evidence in pursuance of the agreement made between the claimant and the Secretary of the Navy and was not objected to by the claimant at the trial. The claimant was represented before the court of inquiry and before the court-martial by counsel.

X.

The only witness produced before said court-martial was Paymaster-General Edwin Stewart, U. S. Navy, who testified that he had never seen claimant take a drink, and in respect to specification 4 of charge 2, that on one occasion, at the Pensacola Navy-Yard, at a time when the claimant was charged with "drunkenness on duty"—"his conversation was coherent and his manner courteous," that witness had the impression "that he had been drinking"—"there was some slight thickness of articulation which impressed me," but "as I had never seen him take a drink in my life, I am somewhat reluctant to assert positively that he was under the influence of liquor."

XI.

Claimant was tried upon two charges of drunkenness and drunkenness on duty, each containing six specifications. Upon the evi-

dence so submitted, said court-martial found the claimant guilty of both charges as alleged and sentenced him to be dismissed from the Navy. This sentence was approved by the Secretary of the Navy on June 30, 1897, and submitted to the President, who, on July 8, 1897, issued -he following order:

"EXECUTIVE MANSION, *July* 8, 1897.

"The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list.

WILLIAM McKINLEY."

In accordance with said order the claimant was paid between July 8, 1897, and June 30, 1899, at the rate of $1,750 per year, being one-half sea pay under Revised Statutes, section 1556, and between July 1, 1899, and July 11, 1901, at the rate of $2,000 per year, being one-half sea pay under the naval personnel act of March 3, 1899. The difference between such pay and waiting orders pay for the same period is as follows:

Waiting Orders Pay.

Under Revised Statutes, United States:		
July 8, 1897, to June 30, 1898.....	$2,255.77	
July 1, 1898, to June 30, 1890.....	2,300.00	
Under Navy Personnel act:		
July 1, 1899, to June 30, 1900.....	3,400.00	
July 1, 1900, to June 30, 1901.....	3,400.00	
July 1, 1901, to July 11, 1901.....	102.41	
		$11,458.18

19 *Pay Received.*

Under Revised Statutes United States:		
July 8, 1897, to June 30, 1898.....	$1,716.35	
July 1, 1898, to June 30, 1899.....	1,750.00	
Under navy personnel act:		
July 1, 1899, to June 30, 1900.....	2,000.00	
July 1, 1900, to June 30, 1901.....	2,000.00	
July 1, 1901, to July 11, 1901.....	57.69	
		$7,524.04
Difference in pay.....		3,934.14

XII.

That the claimant, after the action of said court-martial, both before and after the approval of its finding by the President of the United States, protested against the illegality of these proceedings, as

a result of which protest on July 11, 1901, the unexpired period of his sentence was remitted by order of the President.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition is therefore dismissed.

Opinion.

BOOTH, J., delivered the opinion of the court:

Commander Mullan, the claimant herein, while serving as commandant at the navy-yard at Pensacola, Fla., learned of certain accusations of misconduct having been preferred against him to the Navy Department. Desiring to refute the same, he requested the Navy Department to refer them for investigation to a court of inquiry. Complying with his request, the Navy Department ordered a court of inquiry to be convened at the navy-yard at Pensacola, Fla., for the purpose of investigating the same. The result of the court of inquiry's investigation was a finding adverse to the claimant. Not being satisfied with the finding of the court of inquiry, claimant again appealed to the Navy Department requesting the Secretary of the Navy to convene a court-martial for an investigation of said charges. Complying with this request, the Navy Department did convene a court-martial at the navy-yard, Washington, D. C., for the purpose of trying claimant upon such parts of the findings of the court of inquiry as it deemed proper to charge against him.

The correspondence leading up to and resulting in the assembling of the court-martial is fully set out in the findings. The sentence of the court-martial was likewise adverse to the claimant, and he would thereunder have been dismissed from the Navy save for the order of the President, as set out in finding XI.

This suit is for the recovery of the difference in pay between the amount paid him after the sentence of the court-martial and the amount alleged to be due as waiting-orders pay. The case involves the legality of the court-martial.

Civil courts are precluded from setting aside or reviewing the proceedings and sentences of courts-martial where it affirmatively appears that they were legally constituted and had jurisdiction of the offense charged the person of the accused and complied with
20 the statutory regulations governing their proceedings. (*Dynes v. Hoover*, 20 How. 65; *Ex parte Reed*, 100 U. S., 13; *Smith v. Whitney*, 116 U. S., 167; *Johnson v. Sayre*, 158 U. S., 109; *Swaine v. United States*, 165 U. S., 553; *Carter v. McClaughry*, 103 U. S., 365; *McClaughry v. Deming*, 106 U. S., 49.)

Claimant first challenges the jurisdiction of the court-martial over the subject-matter of the offense charged, predicating the same upon the condition imposed by the Secretary of the Navy as to the admissibility of the evidence adduced before the court of inquiry as evi-

dence before the court-martial, the Secretary manifestly having refused to accede to claimant's request for a court-martial unless the admissibility of the same was previously agreed to; and upon said testimony being inadmissable before the court-martial under article 60 of section 1624, Revised Statutes; and being so could not be validated by stipulation of the parties.

Article 60, section 1624, Revised Statutes, reads as follows:

"The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge-advocate, and shall, in all cases not capital nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony can not be obtained."

It is to be observed that claimant's privilege to have the accusations made against him to the Navy Department first investigated by a court of inquiry and again investigated by a court-martial, the supreme military tribunal, was not a matter of statutory or military right. No charges had been preferred against the claimant by the Navy Department and no effort had been made or was being made by the Department to secure his dismissal from the service because of the accusations against him, so far as the record before us discloses. The Secretary of the Navy was vested with power to convene such a tribunal, but also with discretion as to convening the same. Claimant had made an appeal for the exercise of the Secretary's discretion, but he nevertheless still had the right and privilege to reject or accede to the stipulation respecting the waiver of statutory requirements as to the admissibility of testimony prior to the convening of the court-martial. The convening of the court-martial was entirely for his benefit, for unless he could acquit himself of the charges preferred he would be shortly liable under the provisions of the act of August 5, 1882, section 1447, Revised Statutes, providing for his promotion, to which he was at the time eligible, to be discharged from the service with not more than one year's pay. The Navy Department could well have rested the case upon the findings of the court of inquiry in so far as claimant's right to promotion was concerned. Moved, no doubt, by a desire to afford to the claimant every available proceeding to acquit himself of the charges preferred against him, that he might secure the benefit of the act of August 5, 1882 (*supra*), his request for a second investigation was granted. It is not contended that claimant or his counsel were ignorant of the existence of or terms of article 60, section 1624 of the Revised Statutes. The correspondence between claimant and Secretary of the Navy respecting the admissibility of this testimony indicate a full knowledge upon his part as to the statutes relating thereto.

21 During the progress of the trial the agreement was observed by claimant and his counsel and no objection entered of record to the production and consideration of said evidence by the court-martial. The question of waiver is usually one of fact. The right itself has some limitations grounded upon the doctrine of public policy. The rule, however, is well established that one may waive the advantage of a law intended for his benefit where the waiver does not affect the right of others or contravene the public good. It is as-

serted, however, with much earnestness that article 60, *supra*, being legislation for the mutual benefit of both claimant and defendants, was mandatory and not subject to waiver. The purpose of the statute was to so limit and circumscribe the proceedings of courts-martial as to secure to the accused the right to be confronted with the witnesses against him in cases extending to capital punishment and dismissal from the service the extreme penalties imposed for violation of military law. While confined within narrower limits than the rights secured to persons in civil life accused of crime under Article VI of the Federal Constitution, its intent is similar thereto, the Congress by its passage seeking to extend to the military officers of the Government accused of military offenses and subject only to the jurisdiction of military tribunals the same guarantees extended to those in civil life similarly accused, subject to trial before civil tribunals.

It is to be observed that the proceedings of a court of inquiry are not admissible under the statute in any case unless it affirmatively appears that oral testimony is unobtainable, thus securing to the accused even in minor offenses the right to exclude the findings of a court of inquiry, except in those extraordinary cases where all oral testimony as to the event has disappeared. The statute in its entirety seems to clearly indicate an intention to surround the accused with that high degree of protection whereby he may be legally assured that he will not be summarily divested of his rights under the law—a guaranty identical in most respects with that extended to civil persons in the bill of rights (Art. 6, Constitution). In *Reynolds v. United States* (98 U. S., 158, 159), a case wherein the constitutional provision respecting the right of the accused to be confronted with witnesses against him was directly involved, Chief Justice Waite, speaking for the court, uses this language:

"The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him, but if he voluntarily keeps the witnesses away he cannot insist on his privilege."

Again he says:

"So that now in the leading text-books it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence."

True, in the case at bar the witnesses against the accused were not prevented from attending through the intervention of any wrongful act upon his part. Yet the stipulation waiving the right to insist upon their presence, if not binding, would have put the accused in the attitude of having secured the second hearing before a court-martial upon false representations. The claimant voluntarily surrendered an express provision of law the complete import of
22 which he well knew. By so doing he acquired another right not given to him by law to again present his defense to serious accusations against himself. If he is now permitted to avail himself of a defense in a civil tribunal which he might have presented to the tribunal having full jurisdiction at the time of the

hearing, he will be in effect permitted to contravene the consequences of his own voluntary act, and repudiate now an agreement which should in justice have been repudiated then, if at all. In the case of *Williams v. The State* (61 Wis., 281) the question of the right to waive a constitutional guaranty similar to that in article 6 of the Federal Constitution arose. The accused had been convicted of murder in the first degree. The evidence of a witness given before the coroner's inquest was read to the jury by the consent and stipulation of the State's attorney and the attorney for the defendant. In affirming the judgment of the trial court the Supreme Court said:

"But it is said that, as the Constitution provides that the accused shall enjoy the right to meet the witnesses face to face, he can not waive that right, and therefore the stipulation of the counsel that it might be read goes for naught. It is well settled that the accused may waive his right to be confronted with the witnesses on the trial."

In the case of *State v. Polson* (29 Iowa, 133), the court said:

"It will be observed that the right secured by this provision to the accused, to be confronted with the witnesses against him, is a personal right limited to proceedings in criminal prosecutions, or where the life or liberty of the citizen is involved. The provision is not in the nature of an inhibition upon a proceeding not in accord with the one secured. Neither is it in the nature of a jurisdictional limitation upon the authority of the court, prohibiting the exercise of power except in the manner specified. It simply secures a personal right, and in no manner affects the jurisdiction of the court when prosecutions are tried. It very clearly appears that this right in proper cases, when no wrong can be done the accused, may be by him voluntarily waived. * * * It has been expressly ruled that when a prisoner permits illegal testimony to be given to the jury without objection, he can not afterwards raise any claim of privilege on account of the admission of such evidence."

In the case of *Warren v. Glynn* (37 N. H., 340), the court said:

"Indeed the authorities are too numerous for citation, where it has been held that a party, cognizant in the earlier stages thereof, of an objection that might be fatal to the validity of a proceeding before a tribunal otherwise competent, can not be permitted to lie by and take his chances of a result in his favor, and, after one has been arrived at against him, avail himself of that objection to avoid the consequences of such adverse result."

To the same effect are sections 118 and 1205, 1 Bishop, on Criminal Procedure. Indeed, the question is too well settled to admit of further citations.

While the constitutional provision to which we have referred has no application to the proceedings of courts-martial and is applicable only to criminal prosecutions in the civil courts of the United States, its interpretation by the civil courts is nevertheless exceedingly persuasive in giving effect to a legislative enactment to accomplish a similar intent in proceedings of courts-martial.

23 On March 15, 1825, Hon. William Wirt, then Attorney-General for the United States, responding to a request from the Secretary of the Navy in reference to the legal effect of a waiver of the privileges set out in the ninety-first article of war, said:

"It is a settled rule of law that no evidence is to be given against a prisoner but in his presence. This, however, is a privilege for the benefit of the prisoner, which it is perfectly competent for him to waive; and, as I understand your letter of the 12th, it has been waived in the case therein stated, by the consent of the officer who is about to be put upon his trial, and the depositions of witnesses abroad, taken upon interrogatories and cross-interrogatories, should be used on the trial. I do not think that the point of time at which this consent was expressed will effect the competency of the testimony."

We have been unable, after a most careful and exhaustive research of the authorities, both military and civil, to discover an opinion contrary to this rule. The evidence adduced before a board of inquiry is surrounded by all the solemnities of evidence taken in a court of record or before a court-martial. The accused is personally present and represented by counsel. The right of cross-examination prevails and every legal inhibition as to its competency or relevancy can be raised at the hearing. While it is a court of inferior jurisdiction and its findings usually advisory, its proceedings are not in anywise summary. The evidence adduced and preserved before courts of inquiry is superior in every respect to depositions. An accused thus arraigned can not plead ignorance of the testimony against him or hope by subsequent examination of the same witnesses, in the same cause, between the same parties, to materially change their testimony.

We therefore conclude that the provisions of the statute governing the admissibility of the findings of the court of inquiry were not departed from by the proceedings of the court-martial.

We are unable to see how the objections now raised as to the departure from article 60, section 1624, Revised Statutes, in any manner goes to the jurisdiction of the court-martial. Were that the only question involved the case would be one of easy solution. The mere effect of the stipulation being made a matter of record at the convening of the tribunal did not preclude the claimant as a matter of right from contesting its validity at the time of the trial. In fact the correspondence relative thereto shows upon its face a submission of this question to the court-martial. The statute in question is not in any manner a limitation upon the jurisdiction of the court-martial. The authority of the tribunal is not proscribed by its terms. It is merely a legal regulation as to its proceedings securing certain rights to the accused, which in the absence of an express waiver upon his part, must be accorded him by the tribunal or subject their findings or sentence to collateral attack in civil courts, and as such we have treated it. The allegation of duress with respect to the stipulation aforesaid is without merit. There were absolutely no circumstances surrounding the execution of the instrument which even tended to limit the free agency of the accused; he was not precluded thereby from introduction of additional testimony. Finding X discloses that he did produce an additional witness, and the stipulation simply included the testimony of the witnesses upon the former hearing without any comment or the findings of the court. No rights
24 of the accused were violated in respect to the convening of the court-martial, for, as before observed, accused was not en-

titled under any law to have such a tribunal convened. It was for his express benefit that he sought to invoke its aid in an appeal to the Navy Department.

Claimant's second contention goes to the validity of the President's action in respect to the sentence imposed upon the claimant by the court-martial, it being asserted that the action of the President in issuing his order of July 8, 1897 (Finding XI), was contrary to article 54, section 1624, Revised Statutes, in that it commuted the sentence of the court-martial, whereas only power to mitigate was authorized.

Article 54, section 1624, R. S., is in these words: "Every officer who is authorized to convene a general court martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

Granting *arguendo* without deciding the correctness of the position taken, we are of the opinion that the statute in question has no application to the President.

The court-martial having been legally constituted and having had jurisdiction of the subject-matter charged, and the person of the accused and its proceedings and sentence having complied with all statutory regulations governing the same, the petition herein will be dismissed.

Petition is dismissed.

BY THE COURT.

25 V.—*Judgment of the Court.*

No. 22822.

DENNIS W. MULLAN
v.
UNITED STATES.

At a Court of Claims held in the City of Washington on the 18th day of February, 1907, judgment in the above-entitled cause was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant, Dennis W. Mullan, be and the same is hereby dismissed.

BY THE COURT.

26 VI.—*Application for and Allowance of Appeal.*

No. 22822.

DENNIS W. MULLAN
v.
UNITED STATES.

Request for Appeal.

On behalf of the claimant we respectfully request the allowance of an appeal to the Supreme Court of the United States from the judgment herein entered on February 18, 1907.

RALSTON & SIDDONS,
Attorneys of Record.

Filed in open Court April 8, 1907.

And it was thereupon ordered that the appeal be allowed as prayed for.

BY THE COURT.

27 Court of Claims.

No. 22822.

DENNIS W. MULLAN
vs.
UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the judgment of the Court; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 15th day of April A. D., 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

O. K.
F. W. B.

Endorsed on cover: File No. 20,713. Court of Claims. Term No. 311. Dennis W. Mullan, appellant, *vs.* The United States. Filed May 14th, 1907. File No. 20,713.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 82.

DENIS W. MULLAN, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a final judgment of the Court of Claims entered February 18, 1907, decreeing that upon the facts found by the court after trial the claimant's petition be dismissed.

The Findings of Fact made by the Court of Claims show that the appellant, now a commander on the retired list of the Navy, was serving in the grade of commander as commandant at the Pensacola, Florida, Navy Yard from July 30, 1896, to March 7, 1897. During this period charges were preferred against him to the Navy Department, and the appellant, learning of these charges, requested the Department to convene a court of inquiry to investigate them. Accordingly, a court of inquiry was appointed, and, after taking the testimony of certain witnesses, submitted to the Department a report adverse to the appellant.

At the time this report was submitted the appellant was subject to examination for promotion to the grade of captain. The effect of the adverse finding of the court of inquiry is well stated in the language of the opinion (Record, page 15) that—

> "unless he could acquit himself of the charges preferred, he would shortly be liable under the provisions of the act of August 5, 1882, section 1447, Revised Statutes, providing for his promotion, to which he was at the time eligible, to be discharged from the service with not more than one year's pay."

On May 19, 1897, the appellant made written application (Record, page 9) to the Secretary of the Navy, requesting "that a court-martial be ordered to try such charges as may be formulated from the findings of the court of inquiry, so that an opportunity may be afforded to try and determine such issues of fact before a naval court having full judicial powers."

On May 25, 1897, the Secretary of the Navy informed the appellant (Record, page 10) that he would convene a court-martial at Washington for his trial upon such charges as the Department might designate, provided that the record of the prior court of inquiry be admitted as evidence, each party to have the privilege of introducing other evidence.

On June 2, 1897, the appellant advised the Secretary of the Navy (Record, page 10) that he would agree to the above proposition if it be understood that the privilege of introducing other evidence should include the right to recall any witnesses who had testified before the court of inquiry, and to take depositions upon written interrogatories.

On June 8, 1897, the Secretary refused to permit the recalling of any witnesses who had testified before the court of inquiry, or to permit depositions to be taken by written interrogatories, requesting appellant to give this letter his immediate attention, "as the Department has determined that there must be a speedy end to the matter" (Record, page 11).

On June 9, 1897, the appellant notified the Department that he acceded to the conditions recited in the above letter (Record, page 12).

In pursuance of this correspondence, a court-martial was ordered by the Secretary of the Navy to try the appellant upon the charges of "drunkenness" and "drunkenness on duty."

At the convening of this court-martial, before the introduction of evidence, the Judge-Advocate presented to the court the letters between the Secretary of the Navy and the appellant, described above, and set forth in full in the Findings of Fact, and the correspondence was spread upon the record of proceedings of the court (Record, page 12).

The evidence submitted to said court-martial consisted of the record of the court of inquiry and the testimony of one witness, whose evidence, which was in favor of the appellant, is set forth on page 12 of the Record.

Upon the evidence so submitted, the court-martial found the appellant guilty of both charges and sentenced him to be dismissed from the Navy. This sentence was approved by the Secretary of the Navy on June 30, 1897, and was submitted to the President, as required by law, who, on July 8, 1897, issued an order in the following language:

> "The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list."

The appellant, after the action of said court-martial, both before and after the approval of its findings by the President, protested against the illegality of these proceedings.

Under the above proceedings the appellant had, between July 8, 1897, and July 11, 1901, the sum of $3,934.14 deducted from the minimum pay of an officer of his grade.

The Court of Claims in its decision rendered February 18, 1907, held that the court-martial having been legally constituted, and having jurisdiction over both subject-matter and person, and no error being manifest in its proceedings or sentence, the petition should be dismissed.

The appellant, therefore, makes the following—

ASSIGNMENTS OF ERROR.

First. The court erred in not holding that the sentence predicated upon the findings of said court-martial was wholly void because the second charge upon which the appellant was tried was beyond the jurisdiction of the court-martial as constituted by the Secretary of the Navy. The maximum penalty attached to the first charge being the loss of ten numbers, the sentence must be sustained, if at all, upon the second charge.

Second. The court erred in not holding that if the acts of the convening authority are not to be construed as restricting the subject-matter of the court's jurisdiction to charges not "extending to dismissal," then the limitations imposed upon the power of the court by the convening authority in respect to the scope of its judicial inquiry are contrary to public policy, and a court-martial so restricted by the convening authority in the matter of its proceedings is not lawfully constituted, and has neither jurisdiction of the person of the defendant nor the subject-matter of the cause.

Third. The court erred in not holding that the sentence of said court was inoperative because it was not approved by the President, and that the order of the President issued July 8, 1897, was void because in violation of article 54 of section 1624 of the Revised Statutes of the United States.

ARGUMENT.

The several assignments of error will be considered in the order in which they are stated above.

FIRST ASSIGNMENT OF ERROR.

Charges Not within Jurisdiction of Court-Martial as Constituted by Secretary of the Navy.

This assignment is based upon the fact that the stipulation that the proceedings of a court of inquiry be admitted as evidence before a court-martial would only be valid in "cases not capital nor extending to the dismissal of a commissioned or warrant officer;" that at the time of the correspondence between the Secretary of the Navy and the appellant no charges had been formulated, and that to give the only possible legal intendment to the acts of the Secretary of the Navy as the convening authority of the court-martial, it must be presumed that the charges to be considered were impliedly restricted to those of lesser degree than those extending to dismissal.

The sentence could not be sustained upon the first charge, as the penalty for the offense of "drunkenness" is limited to loss of ten numbers.

The order convening the court was issued in connection with certain correspondence between the Secretary of the Navy and Commander Mullan which is quoted in the Findings of Fact. This correspondence was by the Judge-Advocate presented to the court before the trial of Commander Mullan commenced and was made a part of the record of the court. It was signed by the authority convening the court and is unquestionably to be considered as an act of the convening authority. As such it is a limitation upon the order convening the court.

The right of the convening authority to amend, modify or supplement the formal order convening the court at any time before or during the trial is well established (Winthrop's Military Law [1896], page 233).

An examination of this correspondence shows the following facts:

First. The accused requested trial upon any charges the Department might formulate upon the findings of the court of inquiry. This court had investigated and reported concerning a number of charges of more or less gravity, all of which were eliminated from the court-martial charges, except the two charges above referred to.

Second. The Department refused to order a court-martial.

Third. At the same time the Secretary offered to try him upon such portions of the findings of the court of inquiry as might be deemed proper to charge against him, provided that the record of the court of inquiry be accepted as evidence in the case, and the further condition later required that no witnesses there produced be again called for examination or cross-examination by either side.

Article 60 of section 1624 of the Revised Statutes of the United States, prescribing the rules for the government of the Navy, provides that proceedings of a court of inquiry may "in all cases not capital, *nor extending to the dismissal of a commissioned or warrant officer,*" be evidence before a court-martial if oral evidence cannot be obtained.

It would be competent for the Secretary of the Navy and the accused officer to stipulate before a trial that, in view of the difficulties preventing the production of oral testimony, the proceedings of a court of inquiry might be admitted in evidence. Such an agreement would be entirely lawful. It would be necessary in many cases to prevent a miscarriage of justice, for otherwise it would not be known, until the court-martial had passed upon the question of the possibility of producing oral testimony, whether the proceedings of the

court of inquiry would be admitted, and the party offering the evidence would be put to a considerable disadvantage.

Such an agreement is not expressly or impliedly forbidden by the statute. By the plain and mandatory provision of the statute, however, such evidence is not admissible in a case extending to the dismissal of a commissioned officer, whether oral evidence can or cannot be obtained.

The contention may be made by the appellee that the statute—Article 60 of R. S. 1624—did not prohibit the admission in evidence in Commander Mullan's case of the record of proceedings of the court of inquiry.

The section is as follows:

> "Article 60. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the Judge-Advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained."

It has been contended that this section making such proceedings admissible "in all cases not capital, *nor extending to the dismissal* of a commissioned or warrant officer," renders them inadmissible only in cases in which the sentence of dismissal is mandatory—that is, where there is no other punishment of less degree authorized.

We do not find that the courts have ever had occasioned to interpret this section. The fallacy of any such contention can be seen by an examination of the preceding articles of section 1624, which in great detail classify the various offenses and prescribe the punishment which a court-martial is authorized to impose.

In no case is the death penalty mandatory. Article 7, first enacted in the Act of July 17, 1862, the same act wherein Article 60 is found, provides that in any case in which a court-martial is authorized to adjudge the death penalty it may adjudge imprisonment at hard labor.

The only provision requiring sentence of dismissal upon conviction is that of Article 18, that officer employing his forces in returning fugitive from service or labor be dismissed. This was enacted March 13, 1862 (12 Stat., 354). Its object at that date was apparent, and the stringency of the penalty shows that Congress did not, in the Act of July 17, 1862, now Article 60, intend to make beneficent exception in favor of persons accused thereunder, which is denied to other persons accused of offenses of equal gravity.

On the other hand, there are numerous offenses which do not extend to dismissal. For nearly all of the offenses enumerated in the several articles, the punishment is "such punishment as a court-martial may adjudge." This is only restricted by Article 63, that where the punishment is left to the discretion of the court it "shall not, in time of peace, *be in excess of a limit* which the President may prescribe." That the statute was intended to refer to these cases, and to permit the use of such evidence is, we think, sufficiently clear.

Moreover, the use of the word "extending" in this section necessarily implies a possibility of a lesser sentence. In Wisconsin Central Railway Co. *vs.* Comstock, 71 Wisc., 88, the court held that the word "extended" implies something to be extended and is necessarily connected with that something. It is derived from "ex," meaning from or out of, and "tendere," to stretch or stretch out.

The case of Goulding *vs.* Hammond, 54 Fed. Rep., 639; 4 C. C. A., 533, also defines the meaning of the word in a connection having significant relative bearing upon the present case.

Another illustration of the use of this word is found in another part of R. S., 1624. Article 53 provides that "no sentence of a court-martial *extending to* the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President."

This could not refer to cases wherein the sentence was mandatory upon the court; for, as above explained, no sentence of death is mandatory (Article 7).

Jurisdiction of Court as Constituted.

An agreement or order of the head of an executive department directly contravening the statute law is void for want of authority on the part of the government agent. It is also void as against public policy (Glavey *vs.* U. S., 182 U. S., 595). It is therefore not competent for the Secretary of the Navy to agree or order that the record of a court of inquiry should be admitted in a case where it is forbidden by the statute.

In this case the order convening the court and the conditions precedent to that order signed by the convening authority and made a part of its record are susceptible of two constructions. From a casual reading of the language employed it would appear that the word "charges" as used in that correspondence included all charges and would cover those upon which the claimant was tried. By one of the canons of construction, too familiar to the court to need supporting authorities, the agreement must be interpreted in such a manner as will give it a legal effect, if by any reasonable construction of the words that intention can be deduced. If the charges to be formulated contemplated by this correspondence were restricted to charges not extending to the dismissal of the claimant, the agreement would be in proper accord with the provisions of the statute. As the character of the charges was not discussed in the correspondence, but they were left open to be formulated thereafter and subsequent to the acceptance of the proposition by the claimant, it must be presumed that the charges contemplated were those which it would be lawful for the court to try in the manner prescribed.

If, therefore, the court, having before it as a part of its record the act of the convening authority, to be construed in connection with the order convening the court, should exceed the power conferred by the convening authority in considering charges beyond those to which its power of investigation are limited, its action in respect to those charges would be in excess of its jurisdiction over the subject-matter.

Under the law as it existed during the period covered by these proceedings, the limit of the punishment which the court could impose on the first charge was a loss of ten numbers. The limit of punishment on the second charge was dismissal (General Court-Martial Order No. 459 of March 25, 1896). The sentence of the court, as well as that substituted for it by the President, were both in excess of the limit fixed for the first charge and the sentence can only be sustained upon the second charge, which extended to dismissal.

The question may be raised as to whether a court-martial properly constituted for the trial of certain offenses has jurisdiction to render judgment on charges beyond those to which its power of investigation granted by the convening authority extends. Such a court is a court of limited jurisdiction. Its record must affirmatively show that it has jurisdiction over the person of the accused and over the subject-matter and that it has not, by the departure from the law, lost jurisdiction to render a valid judgment. If it has not jurisdiction of the person of the defendant, of the subject-matter, or to render the particular judgment assailed, its decision may be collaterally questioned (McClaughry *vs.* Deming, 186 U. S., 69).

As was said in the case of Runkel *vs.* U. S., 122 U. S., 543:

> "Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.

> "As the sentence now under consideration involved the dismissal of Runkel from the Army, it could not become operative until approved by the President, after the whole proceedings of the court-martial had been laid before him."

Also in the case of McClaughry *vs.* Deming, *supra*, the court was declared to be "a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved." In the present case the court was convened for a specific purpose, as its record shows—the trial of Commander Mullan upon certain charges. The convening authority, in this case the Secretary of the Navy, fixed the powers of the court, the scope of its investigation, and the purpose for which it was created, as also appears from the record of the court. The subject-matter of the charges upon which the accused was tried and convicted was not within the authority granted and was such that the court could not, upon the evidence provided for by the convening authority and which was before it on the trial, render a valid judgment. As the Supreme Court said in the case of Runkel *vs.* U. S., referred to above, a court-martial is called into existence for a special purpose, to perform a particular duty. To give effect to its sentence it must affirmatively appear that the court was properly constituted; that it had jurisdiction of the person of the accused, of the subject-matter, and to render the particular judgment. Its authority is statutory and the statute under which it exists must be followed throughout.

SECOND ASSIGNMENT OF ERROR.

Illegality of Constitution of Court.

It is an essential characteristic of a judicial proceeding that the parties thereto have the right to submit such evidence as is by the common and statute law competent and admissible.

The converse is equally true—that the parties shall have the right to restrict their opponent's evidence to that which comes within the rules of admissibility defined by the statute or common law. When these rights are regulated or qualified by the parties themselves, the failure to object to evidence, or to produce other evidence, would be merely an irregularity of procedure; but when the court exists, as does a court-martial, by virtue of the order of one of the parties litigant, the waiver is all in favor of that party, exacted as a condition precedent to the order convening the court, and is by the Judge-Advocate, the representative of that party, made a part of the court's record before commencing the trial, the agreement becomes a limitation upon the authority granted in the order of the court, is its authority for receiving evidence contrary to statute, and had the claimant departed from the agreement in the trial of the case, the court would undoubtedly, acting on that authority, have denied his right. The Judge-Advocate so considered it. Otherwise there would have been no explanation for his having the correspondence set out in the findings made a part of the record of the court-martial.

With special strictness are and should these rules be enforced in favor of the accused in courts, either civil or military, in prosecutions for crimes.

If the objection now collaterally made related merely to the error of the court in admitting incompetent and inadmissible evidence, we are fully aware that this court could not consider it. The present case, however, is one wherein the error lies deeper. The accused goes into court with a waiver of this right forced from him. The court itself is created under statutory authority by the officer who has required him to waive these rights, and the agreement between the officer, upon whose order the court depends for its existence, and the accused, is made a part of the records of the court before the trial commences. It is thus incorporated in the proceedings and is in reality an amendment of and a

part of the order creating the court. If it be true that a portion of the order establishing a court-martial is void as against public policy and in violation of law, can that court, proceeding thereunder, exercise any function of a legally constituted court-martial?

The effect of an agreement made by the head of an executive department, whereby an employee for no additional consideration waived a statutory right, was considered by the Supreme Court in the case of Glavey *vs.* U. S., 182 U. S., 595, and held to be against public policy and void. Moreover, in the present case the rights waived by the claimant were not merely his statutory rights, but of such a character that he had no power to waive them, nor had the Secretary of the Navy the right to disregard them. The establishment and maintenance of the Navy is a matter or vital interest and consequence to the Government and to the whole people of the United States. The result of the action against Commander Mullan was possibly to force from the naval establishment, against his own volition, an officer whose tuition at the expense of the Government and long years of experience had made his services valuable.

Congress, by prescribing the manner of proceedings extending to dismissal of officers who can and are willing to render valuable service, has made a provision which protects not only the officer, but the people of the United States, and it is not competent for any one to waive that provision except the people of the United States speaking through their legislative body.

Judgment of a Court-Martial Improperly Convened is Subject to Collateral Attack.

Under no system of law—the existence of this court depending wholly upon the Constitution and statutes of Congress—there can be no such thing as a *de facto* court-martial (Hiekman *vs.* Jones, 76 U. S., 197; Hildreth *vs.* McIntire, 24

Ky. (1 J. J. Marsh), 206; Perkins *vs.* Corbin, 45 Ala., 103; 3 Am. Rep., 698; Tompkins *vs.* Makwin, 26 Ark., 586; 7 Am. Rep., 628; Snyder *vs.* Snyder, 3 W. Va., 200).

This point was directly determined in Deming *vs.* McClaughry, 186 U. S., 49, where the officers named in the order were not, under the statutes, eligible to try the accused. In that case it was further held that consent of the accused cannot confer jurisdiction where there is a defect in the organization of the court.

In that case the contention presented by the Government was in certain respects similar to the case at bar. The defense there made was that the statute disregarded in convening the court had reference to the procedure merely and did not extend to the jurisdiction of the court. That "it merely provides that certain officers shall not be competent to sit on such courts to try certain offenders, and that the jurisdiction of the court to hear and decide is regulated by other articles."

In answering this contention, Justice Peckham, delivering the opinion of the court, said:

> "But the court-martial that has jurisdiction over any offenses must, in the first place, be legally created and convened. Such a court is *not a continuous one, created by the statute itself* and filled from time to time by appointments of certain members under the power given by statute. The court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members; and when in appointing such members he violates the statute, as in this case, by appointing men to compose the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction over either the subject-matter of the charges against a volunteer officer or over the person of such an officer. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate

> from the officers detailed to compose it. By the violation of the law the body lacked any statutory authority for its existence, and it lacked, therefore, all jurisdiction over the defendant, or the subject-matter of the charges against him. It is said, in Keyes *vs.* United States, 109 U. S., 336, 27 L. Ed., 954, 3 Sup. Ct. Rep., 202, that where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."

The defense may contend that the provision disregarded in Commander Mullan's trial was a mere statutory provision in his favor which, if waived, permitted the court to proceed. This contention must necessarily fail if it be true, as indicated above, that the provision protects not merely the officer but the State. The language of the section is that the proceedings of courts of inquiry "shall, in all cases not capital, *nor extending to the dismissal of a commissioned or warrant officer,* be evidenced before a court-martial, provided oral testimony cannot be obtained."

In the case of Glavey *vs.* United States, 182 U. S., 595, it was held that an agreement to waive part of a statutory salary, required of an officer, prior to appointing him to the office, was void on grounds of public policy. The court quoted from the decision of Judge Lacombe in Miller *vs.* United States, 103 F. R., 415, in part as follows:

> "Any bargain whereby in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy and should not be tolerated by the courts. * * * And if public policy prohibits such a bargain in advance, it would seem that a court should be astute not to give effect to such an illegal contract by indirection, as by spelling out a waiver or estoppel."

The Supreme Court (opinion by Justice Harlan) concurred in this view and suggested that if the right of the Executive be admitted to bargain away the provisions of statute relative to salary the subject would become transferred to the control of that branch of the Government. "Public policy," the courts say, "forbids the recognition of any such power as belonging to the head of an Executive Department."

There are instances, illustrated by the present case, where the interests of the accused officer call for the review of charges by court-martial. If the courts permit the officer authorized to convene the court to require waivers of statutory rights of the accused as conditions precedent to the ordering of the court, the subjects which Congress has seen fit to provide for by statute in respect to such courts are taken from the control of Congress and vested in the head of the department. And if the courts are to hold that the failure of the officer to object during the trial—when the agreement is held over him and he realizes that retraction on his part will undoubtedly result in the adjournment and dissolution of the court—is a waiver of his rights, then the evil will by indirection be permitted to exist. This same situation occurred in the Glavey case, wherein the court held that the waiver of his salary and the failure of the plaintiff to demand compensation until the termination of his employment did not defeat his suit.

The provision waived in this case—but which we maintain it was incompetent for the parties to waive—was a statutory provision made by Congress under its constitutional authority. It was a matter of substantial interest to the accused. The court was legally bound by the statute, notwithstanding this agreement, to enforce the law as Congress has made it. In the case of Dynes *vs.* Hoover, 201 How., 65, it was held:

> "The case in hand is not one of a court without jurisdiction over the subject-matter, or that of one

which has neglected the forms and rules of procedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed, as they are directed to be by the statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void."

* * * * * * *

"When confirmed it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject-matter or charge, *or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise.* In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury.

"Persons, then, belonging to the Army and the Navy are not subject to illegal or irresponsible courts-martial, *when the law for convening them and directing their proceedings of organization and for trial have been disregarded.* In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment."

* * * * * * *

Courts-martial derive their jurisdiction and are regulated with us, by an Act of Congress, in which the crimes which may be committed, the manner of charging the accused, *and of trial,* and the punishments which may be inflicted, are either expressed in terms, or they may get jurisdiction by fair deduction from the definition or the crime that it comprehends."

THIRD ASSIGNMENT OF ERROR.

Illegality of President's Action.

The section of R. S. 1624 under which this contention is made is as follows:

> "Art. 54. Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

This section relates back to the provisions of Article 38—

> "General courts-martial may be convened by the President, the Secretary of the Navy, or the Commander-in-Chief of a fleet or squadrons."

Also to Article 53, providing that—

> "No sentence of a court-martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President."

That such an approval by the President in a case where the sentence of dismissal is imposed, as was done in the case at bar, is essential to the validity of the sentence has been judicially determined. Runkel *vs.* United States, 122 U. S., 543. This case was cited with the following quotation, in the case of McClaughry *vs.* Deming, *supra:*

> "In order to give effect to the judgment of a court of that nature it must appear affirmatively that the court was legally constituted; that it had jurisdiction, and that all the statutory requirements governing that jurisdiction has been complied with, and that its sentence was conformable to law."

The question before the court in the Runkel case was stated by the court as follows:

> "As the sentence now under consideration involved the dismissal of Runkel from the Army, it could not become operative until approved by the President, after the whole proceedings of the court-martial had been laid before him. The important question is, therefore, whether that approval has been positively shown."

The President's confirmation of the sentence of a court-martial is therefore one of the "statutory regulations," the failure to execute which in conformity with law will render the judgment subject to collateral attack.

Upon this branch of the case the sole question before the court for determination is, we insist, whether the sentence imposed by the President on revision of the proceedings is in violation of Article 54 of section 1624, R. S. U. S. That article gives power "to remit or mitigate, *but not to commute*, the sentence."

The action of the President was not under his pardoning power, but in pursuance of his statutory duty to review all sentences of courts-martial extending to dismissal. (Article 53, *supra*.)

We quote the following order of the Navy Department construing Article 54:

GENERAL COURT-MARTIAL.

Order No. 89.

NAVY DEPARTMENT,
WASHINGTON, *October* 6, 1899.

George Van Orden, naval cadet, U. S. Navy, having been tried by general court-martial on board the U. S. S. *Helena*, and found guilty of "leaving his station before being regularly relieved," was sentenced "to be dismissed from the naval service of the United States."

The revising authority, "in consideration of the recommendation for clemency, signed by six of the seven members of the court, and in view of the fact that Naval Cadet George Van Orden was transferred to the United States Marine Corps as a first lieutenant, July 1st, 1899," mitigated the sentence "to a loss of fifteen numbers in that grade."

Article 54 of the articles governing the Navy confers upon every officer authorized to convene a general court-martial "power on revision of its proceedings to remit or mitigate, *but not to commute* the sentence of any such court which he is authorized to approve and confirm." The action of the revising authority in changing the punishment awarded by the court in the case of Van Orden from dismissal to loss of numbers, amounted to a commutation of the sentence (Winthrop's Military Law, edition of 1896, p. 722), which is expressly forbidden by the statutory provision just quoted. This being the case, the sentence has accordingly been set aside and the reviewing officer instructed to take such action as may be necessary in accordance with this decision of the Department.

CHAS. H. ALLEN,
Acting Secretary.

Section 112 of the Articles of War, *applicable only to the Army*, gives to the reviewing authority the power to pardon or mitigate, except in cases where the penalty of death or dismissal has been imposed. Concerning this section, Winthrop in his work on Military Law (1896) states:

"The 'power to pardon' given by this article being a power of remission only, and remission consisting simply in the doing away with a punishment, the exercise of the authority to commute would appear to be excluded from the contemplation of the statute. We have seen that commutation is distinct from mitigation. The conclusion would thus be that a military commander could not legally commute a punishment by the authority of this article. In this connection

> there may be some significance in the fact that the article expressly excepts from the application of the power conferred the punishments of death and *dismissal*, these being punishments *which can be abated by commutation only*" (page 723).

It will be noted that Commander Mullan's sentence not only suspended him but reduced his rank. Concerning reduction in rank or loss of numbers this same author states:

> "As remarked of suspension, it is sometimes resorted to by way of *commutation* for a more severe penalty, as dismissal" (page 631).

This is, of course, permissible under Article 112, relating to the Army, because of the exception of death and dismissal from the punishments which the reviewing authority cannot commute.

In a note—page 722—the same author states further that any contention that suspension is a mitigation of dismissal is erroneous:

> "Dismissal being an absolute and final separation of the person from the military office and from the Army—a status admitting of no degrees. Dismissal is therefore commuted, not mitigated, when suspension is substituted for it by the pardoning power."

Bouvier defines "mitigation" as "reduction; diminution; lessening of the amount of a penalty or punishment."

Commutation of a sentence is "a change of one punishment known to the law for another and different punishment also known to the law." "The substitution of a less for a greater punishment by authority of law" (*Ex parte* James, 1 Nev., 321; Lee *vs.* Murphy, 22 Grat., 728).

To commute is defined "to exchange for one penalty or

punishment another less severe" (Rich *vs.* Chamberlain, 107 Mich., 381).

See also:

Ex parte Parker, 106 Mo., 551.
Ex parte Collins, 94 Mo., 22.
State *vs.* State Board of Corrections, 16 Utah, 478.
Young *vs.* Young, 61 Tex., 191.
State *vs.* Peters, 43 Ohio St., 629.

"Commutation" is a term having a narrower and much more clearly defined signification than "mitigation." It is also a term which has received a repeated and uniform interpretation by the courts, so that no doubt of its peculiar significance can be entertained by the court.

The use of the term in so direct juxtaposition with the term "remit" and "mitigate" in the statute under construction shows that Congress had the distinction clearly in mind. Its purpose was to preserve in the Executive the pardoning power and to add to that power the right to diminish the amount of punishment by mitigation—in reality a remission of portion of the punishment made in advance of performance by the defendant and therefore a corollary of the pardoning power. But the statute also had in view the protection of the judicial power of the court-martial from encroachment on the part of the executive officers so constituted the reviewing authority, by the substitution of a punishment different from the character of that awarded by the court, and undoubtedly in some instances the imposition of a penalty which the court would not have imposed in the particular case.

The trouble and delay of re-referring the disapproved sentence to the court may be regarded by the department as a serious obstacle, but its duty is to execute the law as Congress has made it—not to substitute its own view of what sentence should have been imposed.

The action of the President clearly cannot be sustained as a conditional pardon under the pardoning power. Aside from the implied inhibition in Article 60, such a condition as was imposed in this case would be illegal.

A conditional pardon of this nature is a contract between the parties (People *vs.* Potter, 1 Edm. Sel. Cas. (N. Y.), 235; State *vs.* Smith, 1 Bailey L. (S. Car.), 286; 19 Am. Dec., 679; Lee *vs.* Murphy, 22 Grat. (Va.), 791; 12 Am. Rep., 563).

A contract between the Executive for the acceptance of a sum less than the statutory salary attached to his office is void and the officer may recover the full pay (Glavey *vs.* United States, 182 U. S., 595).

Respectfully submitted,

J. H. RALSTON,
F. L. SIDDONS,
W. E. RICHARDSON,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

DENNIS W. MULLAN, APPELLANT,
v.
THE UNITED STATES. } No. 82.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellant in this case is a commander on the retired list of the United States Navy. While holding the same rank upon the active list of the navy, he served from July, 1896, to March 7, 1897, as commandant of the navy-yard at Pensacola, Fla. During his service at said post he learned that certain charges of misconduct had been preferred against him to the Secretary of the Navy and, desiring to have them investigated, he applied to the Navy Department for a court of inquiry. In compliance with his request a court of inquiry was ordered by the Secretary of the Navy, which convened in March, 1897, at the navy-yard at Pensacola,

for the purpose of inquiring into Commander Mullan's conduct "as an officer and gentleman during the time he served as commandant of said navy-yard, from on or about July 3 until on or about March 2, 1897."

The appellant was represented by counsel at the court of inquiry, and after a thorough and impartial investigation, during which 49 witnesses were examined, the court submitted its report to the Secretary of the Navy with the testimony produced before it, from which, among other things, it appeared that upon various occasions while in the city of Pensacola, and while on duty as commandant of the navy-yard at that place, Commander Mullan was in an intoxicated condition. The findings of the court, after a hearing by the appellant and his counsel, were duly approved by the Secretary of the Navy.

Appellant at the time of this report was subject to an early examination for promotion to the grade of captain, and in view of the fact that certain provisions of law relating to the procedure of boards of promotion require that if it shall appear that an officer is unable, by reason of drunkenness or any cause arising out of his own misconduct, to perform at sea the duty of the position to which it is proposed to promote him, he shall not be placed on the retired list of the navy, but discharged from the service with not more than one year's pay. For the purpose, therefore, of having the unfavorable finding in the report of the court of inquiry further investigated, appellant addressed a letter to the Secretary of the

Navy on May 19, 1897, in which he requested that a court-martial be convened to try such charges as might be formulated from the findings of the court of inquiry, in order that the matter be "investigated and passed upon by the highest tribunal known to military law."

To this request the Secretary of the Navy replied, on May 25, 1897, and after reciting the difficulties in connection with assembling a suitable court at a station so distant as Pensacola and of calling the witnesses together, denied his application, but offered to convene a general court-martial at the navy-yard at Washington, D. C., for his trial upon such portions of the findings of the court of inquiry as he (the Secretary) should deem proper to charge against him "provided the record of such court of inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence."

After further correspondence on the subject, fully set forth in the record, it was agreed that the findings of fact of the court of inquiry, the action of the Navy Department thereon, and the memorandum of the Judge-Advocate-General should not be sent to the court-martial, but that only the evidence taken before the court of inquiry should be transmitted. Appellant, by letter dated June 19, 1897, informed the Secretary of the Navy that he acceded to the conditions as contemplated by the letter of the Secretary of the Navy, dated May 25, 1897, and requested the court-martial.

Thereupon, in accordance with such request, a general court-martial was ordered by the Secretary of the Navy, to convene at the navy-yard, Washington, D. C., to try the claimant upon certain charges and specifications selected from the report of the court of inquiry. The court was convened on June 15, 1897, Commander Mullan being represented by his attorneys, Messrs. McCammon & Hayden, and during its sessions on that and succeeding days, one new witness was examined and the depositions of the 49 witnesses examined before the court of inquiry were received and considered, in pursuance of the agreement between Commander Mullan and the Secretary of the Navy, no objections being offered by the appellant or his attorneys at the trial of the case to the evidence so introduced.

The charges upon which appellant was tried by the court-martial were "drunkenness" and "drunkenness while on duty." He was found guilty of both offenses and sentenced "to be dismissed from the United States naval service." The proceedings, findings, and sentence of the court were duly approved by the Secretary of the Navy on June 30, 1897, and submitted to the President with a recommendation that the sentence should be confirmed. The sentence was, however, by the President's order of July 6, 1897, mitigated and the claimant was sentenced "to be reduced in rank so that his name shall be placed at the foot of the commanders in the navy, and to be suspended from rank and duty on one-half of sea pay for the period of five years, during which time he shall retain his place at the foot of said list."

During his period of punishment appellant made frequent protests against the legality of the proceedings of the court-martial by which he was convicted, and on July 11, 1901, the unexpired period of the sentence was remitted by order of the President.

Appellant filed his petition in the Court of Claims to recover the difference between one-half "sea pay" and "waiting orders pay" from the time the proceedings of the court-martial were confirmed and the punishment mitigated by the President to the time the sentence was remitted by him, the amount claimed being $3,934.14. The court below dismissed the petition with an opinion, whereupon appellant made application for appeal to this court.

ARGUMENT.

THE ISSUES.

The questions raised are purely questions of law and appellant's contention may be briefly stated as follows:

First. That the sentence of the court-martial was invalid because the court had no jurisdiction to consider any charge against him involving either capital punishment or dismissal upon the ground that article 60 of section 1624 of the Revised Statutes prohibits courts-martial from considering the proceedings of courts of inquiry as evidence in cases involving capital punishment or dismissal of a commissioned officer; and that appellant's consent to the use of the evidence produced before the court of inquiry, when taken in

connection with article 60, limited the jurisdiction of the court-martial to the consideration of charges of less degree than dismissal.

Second. That the President had no power to change the sentence of the court-martial from dismissal to suspension with half sea-pay and loss of numbers, upon the ground that the change was not in mitigation, but in commutation of the sentence, and, as such, prohibited by article 54 of section 1624 of the Revised Statutes.

JURISDICTION OF THE COURT-MARTIAL.

At the time charges were filed with the Secretary of the Navy, and when the adverse report of the court of inquiry was made, appellant was subject to an early examination for promotion to the grade of captain. Confronting him, however, in his efforts for promotion were the following statutes:

Section 1447, Revised Statutes, which reads as follows:

> When the case of any officer has been acted upon by a board of naval surgeons and an examining board for promotion, as provided in chapter four of this title, and he shall not have been recommended for promotion by both of the said boards, he shall be placed upon retired list.

The act of August 5, 1882 (22 Stat. 286), providing in part as follows:

> That whenever on inquiry had pursuant to law, concerning the fitness of an officer of the navy for promotion, it shall appear that such

> officer is unfit to perform at sea the duties of the place to which it is proposed to promote him, by reason of drunkenness, or from any cause arising from his own misconduct, and having been informed of and heard upon the charges against him, he shall not be placed on the retired list of the navy, and if the finding of the board be approved by the President, he shall be discharged with not more than one year's pay.

The necessity for a clear record was evidently apparent to appellant, and explains the urgency with which he pressed his request for a court-martial. The court of inquiry had been ordered at appellant's urgent request, but, as has been seen, the Secretary of the Navy was unwilling to hold a court-martial at Pensacola owing to the inconvenience set forth. He did, however, on the conditions heretofore named consent to convene a general court-martial at the Washington Navy-Yard. The conditions attached to the convening of this court-martial were deemed necessary in order to meet the requirements of article 60, section 1624, Revised Statutes, which provides as follows:

> ART. 60. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge-advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony can not be obtained.

Appellant takes the position that the provisions of this statute were intended not only to safeguard the rights of commissioned officers and bring them face to face with their accusing witnesses, but were also enacted for the benefit of the naval service, and that appellant therefore had no authority to waive the benefit of the statute. While it may be conceded that article 60, as a whole, was intended for the benefit both of the Government and certain of such persons as should properly be brought to trial before courts-martial, this fact does not prevent the Government, through the Secretary of the Navy, and the appellant from entering upon an agreement waiving its mutual benefits in the trial of the case. There can, however, be no question that the provision against the use of the evidence produced before courts of inquiry in cases on trial before courts-martial involving capital punishment or the dismissal of commissioned or warrant officers was intended for the sole benefit of officers and enlisted men tried upon charges involving capital punishment and commissioned and warrant officers tried upon charges involving dismissal from the service. In this case article 60 might have been invoked for the protection of the appellant, but could not in any particular have been taken advantage of by the Government.

Upon the right to waive the benefits of a statute enacted for the protection of any class of citizens this court, in the case of *Shutte* v. *Thompson* (15 Wall., 159), has laid down the law with great clearness:

> It is to be observed that the objections made are all formal rather than substantial. Still

they are quite sufficient to require the rejection of the deposition, if there is nothing in the case to countervail their effect. But it is obvious that all the provisions made in the statute respecting notice to the adverse party, the oath of the witness, the reasons for taking the deposition, and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud.

Appellant went to trial, represented by counsel, and made no objection whatever to the evidence pro-

duced at the court-martial. On the contrary, his counsel, in their brief submitted to the Secretary of the Navy in support of his request for a court-martial to investigate the adverse findings of the court of inquiry, expressed great satisfaction with the evidence produced before that court, and said (Rec., p. 11):

> It is evident from the large number of witnesses and the thoroughness of examination that it would be scarcely possible to have more evidence adduced before a court-martial than was presented to the court of inquiry.
>
> No court-martial or other military or civil tribunal could have been or could be more successful in eliciting all the facts bearing upon Commander Mullan's conduct.

Furthermore, it has been decided that—

> A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute. (*Pearce* v. *Somerset Ry.*, 171 U. S., 641–648; *Leonard* v. *Vicksburg, etc., R. R. Co.*, 198 U. S., 422, and authorities there cited.)

Moreover, it has been frequently held by this court that a prisoner may waive the constitutional privileges and benefits accruing to him and take the stand in his own behalf. (*Fitspatrick* v. *U. S.*, 178 U. S., 304; *Sawyer* v. *U. S.*, 102 U. S., 165.)

In the case of *Bishop* v. *United States* (197 U. S., 340) Mr. Justice Brown said:

> As the accused when arraigned said he had no objection to any member of the court

> and knew of no reason why the court should not proceed with his trial, it is manifestly too late to raise the objection in view of our decision in *Mullan* v. *United States*. (140 U. S., 240.) * * * His expressed satisfaction with the court as constituted was a clear waiver of any objection to its personnel.

In the case of *Schick* v. *United States*, where proceedings were instituted against appellant by way of criminal information to impose the penalty provided for violation of section 11 of what is known as the oleomargarine act, the parties in writing waived a jury and agreed to submit the issues to the court. The question was afterwards raised as to the right of waiver of trial by jury, and Mr. Justice Brewer, speaking for the court, said:

> We entertain no doubt that the parties could rightfully make such waiver and that the judgments are in no way invalidated thereby.

And in commenting further the learned justice said:

> Article 6 of the amendments, as we have seen, gives the accused the right of a trial by jury. But the same article gives him the further right to be confronted with the witnesses against him and to have the assistance of counsel. Is it possible that the accused can not admit and be bounded by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional nor statutory mandate, and no

public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. (195 U. S., 71–72, and authorities there cited.)

(See also *Tombs* v. *Rochester and Syracuse R. R. Co.*, 18 Barber (N. Y.), 585; *Phyfe* v. *Eimer*, 45 N. Y., 104; *White* v. *Conn. Mut. L. Ins. Co.*, 4 Dill., 183; *Beecher* v. *Marquette, etc., Rolling Mills*, 45 Mich., 108.)

Appellant had the full benefit of the testimony before the court of inquiry. He was confronted by the witnesses; he was represented by counsel; he understood the nature and force of the testimony given by such witnesses; he was fully cognizant and informed as to his rights in the premises. When he agreed that the same evidence should be introduced in the court-martial proceedings he knew exactly the nature and character of the evidence to be considered by the court.

The proceedings were held at appellant's request. He raised no objection at the time of his trial before the court-martial to the waiver which he had voluntarily made as to the introduction of the testimony given by the witnesses at the court of inquiry.

It is too late now and was too late in the Court of Claims for him to introduce his objections to the nature of the testimony considered by the court-martial. He voluntarily and expressly waived his rights in writing to be confronted by the witnesses and again waived such rights by his silence at the court-martial proceedings.

ARTICLE 54 OF SECTION 1624, REVISED STATUTES, HAS NO APPLICATION TO THE PRESIDENT.

The sentence of the court-martial dismissing appellant from the United States Navy was approved by the Secretary of the Navy on June 30, 1897, and submitted to the President, who thereupon issued the following order:

> EXECUTIVE MANSION, *July 8, 1897.*
>
> The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank so that his name shall be placed at the foot of the list of commanders in the navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list.
>
> WILLIAM MCKINLEY.

Article 54 of section 1624 of the Revised Statutes provides:

> Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm.

The contention is made that the act of the President in reducing appellant to the foot of the list of commanders and suspending him from rank and duty on half pay was in *commutation* and not in *mitigation* of the sentence of the court-martial, and therefore illegal.

The Court of Claims in its opinion said:

> Granting *arguendo* without deciding the correctness of the position taken, we are of the opinion that the statute in question has no application to the President.
>
> The court-martial having been legally constituted and having had jurisdiction of the subject-matter charged and the person of the accused, and its proceedings and sentence having complied with all statutory regulations governing the same, the petition herein will be dismissed.

This position is strongly supported by the decision of this court in the case of *Ex parte Garland* (4 Wall., 333–399), where it was held:

> The power of pardon conferred by the Constitution upon the President is unlimited except in cases of impeachment. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. *The power is not subject to legislative control.*

While the President, when he reviews and confirms the sentence of a general court-martial, exercises certain functions of executive authority conferred upon him in his constitutional capacity as Commander in Chief of the Navy, and expressly by certain statutes which make, for example, dismissal dependent upon his action, the fact that he possesses these constitutional and statutory powers does not operate to deprive him of another and distinct function, vested

in him, not as Commander in Chief of the Navy, but as Chief Executive of the nation and the possessor of the pardoning power, inherited as part of the royal prerogative. He may act at the same time in the exercise of both authorities. He may approve a sentence, under the first-mentioned branch of his authority, and then, having confirmed the sentence, he may, in the exercise of his pardoning power, immediately, as Chief Executive, remit or mitigate, in whole or in part, absolutely or conditionally, the penalties imposed by the sentence of the court-martial. The officer under sentence is not compelled to accept a conditional pardon; if he does, however, he accepts it with any ordinary, usual, or appropriate conditions imposed by the President in the exercise of his pardoning power.

It has already been stated that there may be annexed to a pardon any condition which is not immoral, illegal, or impossible of performance. (Am. and Eng. Enc. of Law, second ed., p. 580.)

Where a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions thereof, the effect of the pardon becomes the same as though it were by its terms full and absolute. (Id., 595.)

In the case of *Lee* v. *Murphy*, the Supreme Court of Appeals of Virginia held:

> Though the warrant of a governor speaks as mitigating the punishment, yet as it substitutes a less for a greater punishment, and is intended to be done, and is done, with the con-

sent of the prisoner, it will be considered a pardon, and not a commutation of punishment. (22 Gratt, 789–813.)

Appellant, in this case, having taken advantage of the executive clemency, is not now in a position to complain that the President was too lenient in his action, or that the executive power had no authority to modify the sentence of dismissal. Appellant enjoyed all the fruits and advantages of executive clemency. He did not hesitate to accept the salary or honorarium attached to his reduced rank while he was at the foot of the list of commanders in the navy, and while suspended from rank and duty under the sentence as mitigated by the President. We therefore contend that he is now estopped from denying the validity of the President's action in mitigating the sentence.

THE SENTENCE AS CHANGED STRICTLY IN ACCORDANCE WITH THE LAW.

In addition to our contention that article 54 of section 1624, Revised Statutes, has no application to the President, we further insist that the position taken by appellant, as to the power of the President, has no foundation in law. The jurisdiction of the Court of Claims extends only to claims against the United States involving money alleged to be due to some one named in the petition as the claimant.

In the case at bar the loss of pay, upon which the claim is founded, arose not out of the appellant's reduction in numbers, but out of his *suspension* from

active duty; therefore the question for the court to determine is whether appellant's suspension was *in mitigation* or *in commutation* of his sentence of dismissal by the court-martial.

This court, in the case of the *United States* v. *Murray* (100 U. S., 537), a suit for pay by a clerk in the Treasury Department who had been granted leave of absence without pay for five months, said:

> To our minds it is clear the judgment below was wrong. While under the regulations of the department an employee is not entitled to a leave of absence with pay for more than thirty days in any one year, there is nothing to prevent the Secretary from putting him on furlough without pay at any time, if the exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why, if this can be done, he may not be furloughed without pay, which is in effect a partial dismissal. If he desires to be free from all obligations to serve in the future, he may resign; but if he permits his name to continue on the rolls, it must be on such terms as are imposed by the department. In this case an extraordinary demand for clerical service caused an early partial exhaustion of the appropriation for the year, and it became necessary to dispense with a part of the force, so as to reduce the expenses of the office. Absolute dismissals were not made, but, as a favor to the clerks, their names were kept on the rolls without pay. Murray remonstrated against what was done, but seems to have preferred the furlough to an absolute discharge. Under these

> circumstances, having rendered no service, he can not claim compensation.

The Court of Claims in the case of *Stillings* v. *The United States* (42 C. Cls., 61), where a pilot was suspended from duty without pay, speaking of the case of the *United States* v. *Murray, supra,* said:

> In *United States* v. *Murray* (100 U. S. R., 536) it was held by the Supreme Court that there was nothing to prevent the Secretary of the Treasury from putting an employee on furlough without pay at any time where the exigencies of the service required it; that if an employee might be dismissed absolutely it was difficult to see why such employee might not be furloughed without pay, that being in effect a partial dismissal.

The word "commutation," from the Latin *commutare,* meaning to exchange with, is defined as "putting one thing for another; substitution." Commutation of punishment is "the change of one punishment known to the law for another and different punishment also known to the law." (*Ex parte Janes,* 1 Nev., 321.)

"Mitigation" is defined as "lessening the degree of; diminution as to the severity of; reduction of the amount of; as, of damages, punishment, or penalty." (Anderson Law Dictionary.)

Therefore, it follows that if a suspension or furlough has been held by the courts to be "a partial dismissal," then both may very properly be considered as in *mitigation* and not in *commutation* of a sentence of dismissal.

We are not concerned as to why the President fixed upon one-half sea pay as the pay of the claimant while suspended from active duty. It was no doubt in consideration of the fact that section 1588 of the Revised Statutes provides that—

> The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.

In the exercise of executive clemency so graciously extended to appellant, the President gave him the benefit of the same compensation as fixed by section 1588, Revised Statutes, for certain officers on the retired list whose records are not stained by findings of a court of inquiry and judgment of court-martial, as is the record of the officer in this case.

It is not contended that the President had not the right to approve the sentence of the court-martial dismissing appellant without pay, and if he had such right, he certainly had the power and the prerogative to suspend this officer upon one-half sea pay, as was done in mitigation of the sentence under court-martial proceedings.

HAD THE COURT OF CLAIMS JURISDICTION?

The Court of Claims can in no sense be termed an appellate court. It has no authority to review or consider the action taken by any other court. It is, in fact, a court of original jurisdiction, and can act only where there is a claim alleged to be due to some person from the United States. It has no authority

to correct mistakes of other tribunals. Therefore, even though evidence had been improperly admitted at the trial by the court-martial, the court below could not review or correct the action of that court.

> Civil courts are precluded from setting aside or reviewing the proceedings and sentences of courts-martial where it affirmatively appears that they were legally constituted and had jurisdiction of the offense charged, the person of the accused, and complied with the statutory regulations governing their proceedings. (*Dynes* v. *Hoover*, 20 How., 65; *Ex parte Reed*, 100 U. S., 13; *Smith* v. *Whitney*, 116 U. S., 167; *Johnson* v. *Sayre*, 158 U. S., 109; *Swaine* v. *United States*, 165 U. S., 553; *Carter* v. *McClaughry*, 103 U. S., 365; *McClaughry* v. *Deming*, 106 U. S., 49; Op. C. C., Rec., p. 14.)

Even if the Court of Claims had appellate jurisdiction of the case, the fact that the attorneys for appellant offered no objection either to the jurisdiction of the court-martial or to the admission of the evidence produced before it at the trial would prevent appellant from now taking advantage of that want of jurisdiction; nor could the sentence of the court-martial be attacked collaterally in that court.

> While, of course, a judgment may be directly attacked for errors or irregularities, this can only be done in a direct proceeding either before the same court to set it aside or in an appellate court; if a court has jurisdiction it is altogether immaterial, where its judgment is collaterally called in question, how grossly

irregular or manifestly erroneous its proceedings and decisions may have been. (Am. and Eng. Enc. of L., 2d ed., vol. 17, p. 1042.)

The fact that an erroneous or wrong judgment is rendered does not render the judgment void; while it may be reversed by a proper proceeding in the cause, it can not be attacked collaterally. (Id., p. 1072.)

In doubtful cases, as the safer course, the courts are inclined to treat defects as errors or irregularities rather than jurisdictional defects. (Id., p. 1066.)

This court said in the case of *McClaughry* v. *Deming* (186 U. S., p. 69):

> The question we are now discussing resolves itself into one of jurisdiction simply. If the court-martial had jurisdiction over the subject-matter of the charge against the defendant and of the person, or if the consent of the defendant gave such jurisdiction, the writ of habeas corpus will afford no relief, for generally, in such case, any error committed by a court-martial regularly organized and with full jurisdiction is not assailable before the civil courts. (*Swaim* v. *United States*, 165 U. S., 553; *Carter* v. *McClaughry*, 183 U. S., 365.)

This language is directly applicable to the case at bar, as the court-martial had full and complete jurisdiction of both the person of the defendant and the subject-matter of the charge against him; and this jurisdiction was further fortified by the consent of the defendant to his trial upon the terms proposed by the Secretary of the Navy.

We respectfully cite the very able and comprehensive opinion of the court below, as delivered by Judge Booth. (Record, pp. 14–19, inclusive.) The whole subject-matter is treated with such clearness that little may be added to the forcible reasoning therein.

We believe that appellant has no just cause of complaint as to the legality and regularity of the proceedings of the court-martial before which he was tried. He is not here contending that the executive power did not extend to him that mercy or leniency which the law recognizes the President may extend in the exercise of his discretion. On the other hand, in plain words, appellant says that the President should have stopped at confirming the sentence of the court-martial dishonorably discharging him from the Navy of the United States without pay; or that he should have set the whole proceedings aside and permitted appellant to act in bad faith with the Secretary of the Navy, and treat as a mere bagatelle a solemn agreement entered into by him with full cognizance of his rights and privileges in the premises.

We submit that no error is found in the proceedings of the court below, and therefore ask that the judgment be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

GEORGE M. ANDERSON,
Attorney.

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MULLAN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 82. Argued January 20, 1909.—Decided February 23, 1909.

A commissioned officer in the Navy can waive the provisions of art. 60 of § 1624, Rev. Stat., and allow proceedings of a court of inquiry to be evidence on a court-martial the sentence of which may extend to his dismissal; *Schick* v. *United States*, 195 U. S. 65; and, where, at the request of such an officer, the Secretary of the Navy convenes a court-martial to try him on matter which had already been the subject of a court of inquiry, on condition that the proceedings of such court of inquiry be evidence, each party having the privilege, however, of introducing other evidence, the accused is not deprived of any substantial right so that the sentence of the court-martial is invalidated.

Reduction by the President of the United States of the dismissal of an officer of the Navy from the service to reduction to one-half sea pay for five years is a mitigation of the sentence within the meaning of art. 54 of § 1624, Rev. Stat. *Quære*, whether art. 54 of § 1624 applies to the action of the President.

Civil courts are not courts of error to review sentences of legally or-

ganized courts-martial having jurisdiction of the person of the accused and of the offense.
42 Ct. Cl. 157, affirmed.

THE facts are stated in the opinion.

Mr. W. E. Richardson, with whom *Mr. J. H. Ralston* and *Mr. F. L. Siddons* were on the brief, for appellant.

Mr. John Q. Thompson, with whom *Mr. George M. Anderson* was on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This appeal is prosecuted to reverse the judgment of the Court of Claims dismissing the petition of Dennis W. Mullan, appellant. Full findings of facts were made in the Court of Claims, and upon consideration the claim of the petitioner was dismissed. 42 Ct. of Cl. 157. From the findings of fact made by the court it appears that Dennis W. Mullan was a commander, serving as commandant, at the navy yard at Pensacola, where he served from July 30, 1896, till March 7, 1897. Charges having been preferred against him, at his request a court of inquiry was convened to investigate them. The court of inquiry, after a full investigation and trial, reported adversely to the appellant. At that time he was subject to examination for promotion to the grade of captain, and unless he could acquit himself of the charges preferred he would be liable under § 1447 of the Revised Statutes of the United States (act of August 5, 1882, c. 391, 22 Stat. 286) to be discharged from the service without more than one year's pay. In this condition of affairs the appellant made application to the Secretary of the Navy for a court-martial to try him upon the charges to be formulated from the findings of the court of inquiry. Correspondence ensued between the Secretary of the Navy and the appellant, fully set forth in the report of this case in the Court of Claims. 42 Ct. Cl. 159 *et seq.* The Secretary of the Navy, in answer to appellant's request, proposed to call a court-martial

at Washington for trial upon such charges as the Department might designate, provided the record of the court of inquiry should be admitted as evidence, each party to have the privilege of introducing other evidence. The appellant advised the Secretary that he would agree to such court-martial, it being understood that the privilege of introducing other witnesses should embrace the right to recall witnesses who had previously testified before the court of inquiry, and to take depositions upon written interrogatories. The Secretary of the Navy refused to permit the recalling of witnesses who had testified before the court of inquiry, or to permit testimony to be taken by interrogatories, but permitted the calling of other witnesses. Thereupon the appellant notified the Department that he acceded to the conditions stated in the Secretary's letter. The court-martial was ordered by the Secretary of the Navy to try the appellant upon the charges of drunkenness and drunkenness on duty. The evidence submitted at the court-martial consisted of the records of the court of inquiry, together with one witness called in addition thereto. The court-martial found the appellant guilty of both charges and sentenced him to be dismissed from the Navy; on June 30, 1897, the Secretary of the Navy approved this sentence. The same was submitted to the President, who, on July 8, 1897, made the following order in the premises:

"The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list."

The appellant protested against the legality of the proceedings. At the trial before the court-martial no objection was offered by the appellant or his attorneys to the introduction of the evidence. On July 11, 1901, the unexpired period of the sentence was remitted by order of the President. The suit was

begun in the Court of Claims to recover the difference between "one-half sea pay" and "waiting orders pay," from July 8, 1897, when the President's order was made, as above recited, and July 11, 1901, when the President remitted the unexpired period of the sentence, the amount claimed being the sum of $3,934.14.

It is contended by the appellant that the proceedings of the court-martial are null and void because of the manner in which that court was convened, upon requirement as a condition precedent that the appellant should submit to the introduction of the record of the testimony introduced before the court of inquiry, with the right to call additional witnesses, as hereinbefore stated. This contention is based upon art. 60 of § 1624 of the Revised Statutes, which provides as follows:

"ART. 60. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained."

It is contended that inasmuch as this case did not come within the statutory provisions permitting the evidence before a court-martial to be used, as such right is limited to cases not extending to the dismissal of a commissioned or warrant officer, and a capital case, the court-martial was not properly organized, and its proceedings were null and void. It is insisted that this provision of the law is to enable the accused, in cases of this character, to meet his witnesses face to face, and is analogous to the constitutional right in criminal cases; and, being an enactment for the benefit of the service and the protection of those engaged therein, the appellant could not waive its provisions. But we are of opinion that this was a right which he might waive. In *Schick* v. *United States*, 195 U. S. 65, it was held that a party might, in the case then before the court, waive the right to a trial by jury, and in the course of the opinion Mr. Justice Brewer, speaking for the court, said (p. 71):

"Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right to be confronted with the witnesses against him, and to have the assistance of counsel. Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional nor statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."

The Secretary of the Navy was under no legal obligation to call a court-martial to inquire into the charges made against the accused. The court of inquiry was invoked, as was the court-martial, at the instance of the appellant. He had had a full trial before the court of inquiry, in which the record disclosed a large number of witnesses were called; he was represented by counsel; he was present in person; he had a full opportunity to cross-examine the witnesses and to make a defense. At the court-martial he was permitted to introduce additional witnesses, and had the benefit of one witness whose testimony was in his favor. We think there was nothing in the manner in which the court-martial was organized which deprived the accused of a substantial right in such manner as to oust its jurisdiction in the premises. The civil courts are not courts of error to review the proceedings and sentences of courts-martial where they are legally organized and have jurisdiction of the offense and of the person of the accused, and have complied with the statutory requirements governing their proceedings. *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Reed*, 100 U. S. 13; *Swaim* v. *United States*, 165 U. S. 553.

It is contended that the order of July 18, 1897, in which the President undertook to mitigate the sentence of the appellant, dismissal from the Navy, to reduction to one-half sea pay for the period of five years, with reduction in rank and suspension

as stated, was illegal and unauthorized, because of art. 54, § 1624, of the Revised Statutes of the United States, which provides:

"Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

The Court of Claims was of opinion that this section did not apply to the action of the President of the United States. If it be conceded for this purpose that it is applicable to the President (§ 1624, arts. 38 and 53 of the Rev. Stats.), we are of the opinion that the President's action did, in fact, mitigate the previous sentence of the court-martial as approved by the Secretary of the Navy. It may be conceded that there is a technical difference between the commutation of a sentence and the mitigation thereof. The first is a change of a punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment. Bouvier's Law Dictionary, vol. 1, 374; Ib. vol. 2, 428.

When the President otherwise confirmed the sentence of the Navy Department from absolute discharge from the Navy to reduction in rank and duty for the period of five years on one-half sea pay, he did what in terms he undertook to do, and by the lessening of the severe penalty of dismissal from the Navy, approved by the department, reduced and diminished, and therefore mitigated, the sentence which he was authorized to approve and confirm against the appellant, or mitigate in his favor.

Judgment affirmed.